***United States Court of Appeals***

***for the Second Circuit***

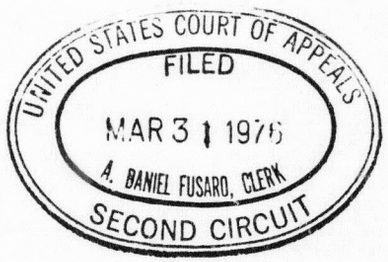

# BRIEF FOR APPELLEE

76-7022

No. 76-7022

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT




LUCIO P. SALVUCCI,

Plaintiff, Appellant

-v-

THE NEW YORK RACING ASSN., INC., ET AL

Defendants, Appellees

B
P/S

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEE, ROOSEVELT RACEWAY, INC.

Submitted by,

Jerome Bauer, Esq.
BAUER, AMER & KING, P.C.
114 Old Country Road
Mineola, New York 11501

Tel: (516) 746-1291

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## TABLE OF AUTHORITIES

## ISSUES PRESENTED FOR REVIEW

I. Whether there was a genuine issue of a material fact to be litigated in the Court below.

II. Whether the complaint states a claim upon which relief can be granted as against Defendant, Roosevelt Raceway, Inc. (Roosevelt Raceway).

III. Whether there is a material triable issue of fact as the same relates to Defendant, Roosevelt Raceway.

## STATEMENT OF THE CASE

This appeal results from a complaint filed by Plaintiff-Appellant, Lucio P. Salvucci, in which he made common allegations against all of the named defendants, but which allegations are obviously limited to only certain of the defendants. The result is that the reader is misled into believing that all defendant-appellees are similarly situated when, in fact, they are not.

The complaint alleges ownership of two copyrights to ideas relating to two complicated betting systems as described in works titled "TRI-3 DOUBLE" and "TRI-3". Copies of these works were attached to the complaint as "Exhibit A" (App. 12 and 15).

Defendant Roosevelt Raceway filed a motion to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure because the complaint did not state a claim upon which relief can be granted. Defendant further moved for summary judgment on the ground that there is no material triable issue of fact. See Defendant's motions (App. 27), supporting affidavit of Defendant's President, George Morton Levy, Jr. (App. 29-34) and Statement Under Rule 9(g), (App. 35-36).

Following a hearing before Mishler, D.J., the United States District Court for the Eastern District of

New York, by Order dated December 2, 1975, (App. 137-141) dismissed the complaint for failure to state a cause of action. The Court stated:

> "It is the manner of expressing and not the idea itself which is copyrightable."--- "The instant copyrights attempt to protect the method of betting and are invalid."--- "Alternatively, should the complaint be interpreted as an infringement of the expression of the betting method, rather than the method itself, the court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by defendants."
>
> "The limited copyright of the expression of the methods of betting was not infringed. Defendants' motions are in all respects granted, ---" (App. 139).

On December 3, 1975, judgment was entered in accordance with that Order. (App. 137).

On December 30, 1975, Plaintiff filed his Notice of Appeal. Since the filing of the Notice of Appeal, Plaintiff also appealed a similar Order of Bownes, D.J., the United States District Court for the District of New Hampshire in a similar action based on substantially the same complaint. A copy of Judge Bownes' Order was attached as "Exhibit 1" (App. 45) to Defendant's Memorandum of Law (App. 37-45).

In a "Per Curiam" Memorandum and Order entered on March 1, 1976, the United States District Court of Appeals for the First Circuit affirmed the judgment of United States

District Court for the District of New Hampshire without considering oral arguments stating:

> "We have examined the record and Plaintiff's Brief. The issue and the answer are so clear that no purpose would be served in hearing oral argument. Judgment is affirmed under Local Rule 12."

A copy of such "Memorandum and Order" is annexed hereto as Exhibit 2.

## ARGUMENT

### I. THE DISTRICT COURT CORRECTLY DISMISSED THE PLAINTIFF'S COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION

Plaintiff's complaint seeks only to prevent others from using the race wagering ideas of his copyrights, even though such ideas are old in themselves. In the case of Briggs v. New Hampshire Trotting and Breeding Association, Inc., 191 F. Supp. 234 (D.N.H. 1960), plaintiff claimed a violation of his copyright by defendant who operated a "Pic-Six" wagering system. In that case, the plaintiff's brochure described a system in which bettors selected the winning horses for each of seven consecutive races. At pages 236 and 237, the Court said:

> "In the present case, the action should be dismissed in part for the legally necessary reason that the statutes and Court decisions give no protection by copyright to sports, games or similar systems as distinguished

> from publications describing them. Another reason for dismissal is that the sport here involved is so elementary and ordinary that it is in the public domain and to afford protection would be to give to the author a monopoly way out of proportion to the originality and creativity involved."

It has long been held that ideas per se cannot be protected by or be the subject of a copyright. Baker v. Selden, 101 U.S. 99 (1880).

In Affiliated Enterprises v. Gruber, 86 F. 2d 958, 961 (1st Cir. 1936), this Court rejected the claim of copyright as a medium for protecting the idea for "bank night", a lottery system in which theatre patrons completed cards for a drawing:

> "The [copyright] statute is infringed only by 'copying' that which is 'copyrighted.'" Davies v. Bowes, (D.C.) 209 F. 53, 55. "One work does not violate the copyright in another simply because there is similarity between the two, if the similarity results from the fact that both works deal with the same subject or have the same common sources."
>
> * * *
>
> "However good and valuable an idea, plan, scheme, or system is, the moment it is disclosed to the public without the protection of a patent, it becomes public property, and the fact that it has been made popular by advertising and the expenditure of effort, time, and money on the part of the originator does not alter the situation."

In Seltzer v. Sunbrock, 22 F. Supp. 621, 630 (S.D. Cal.)(1938), the Court therein held plaintiff's copyright could not cover his described system for conducting

roller skating races:

> "What Seltzer really composed was a description of a system for conducting races on roller skates. A system, as such, can never be copyrighted. If it finds any protection, it must come from the patent laws. . ."
>
> "Even if plaintiffs' books be held to describe a game or sporting event, the rules thereof, as ideas, are not copyrightable. [citation omitted] Nor is the system of staging a game or spectacle covered. Many cases heretofore, and more recently the 'bank night cases,' have made that very clear."

In Dorsey v. Old Surety Life Insurance Company, 98 F. 2d. 872, 873 (10th Cir. 1938), the 10th Circuit Court of Appeals set forth perhaps the most succinct statement of the law upholding a District Court dismissal of a copyright infringement action on a motion to dismiss:

> "The right secured by a copyright is not the right to the use of certain words nor the right to employ ideas expressed thereby. Rather it is the right to that arrangement of words which the author has selected to express his ideas."

See also Roth Greeting Cards v. United Card Co., 429 F.2d 1106 (9th Cir. 1970); Welles v. Columbia Broadcasting System, Inc., 308 F. 2d 810 (9th Cir. 1962).

It would appear that Plaintiff refuses to recognize the protection afforded by the Copyright Law. Ideas per se are not protected and the mere use of an idea cannot form the basis for an action of copyright infringement. Accordingly, the United States District Court for the Eastern District of New York correctly dismissed

the Plaintiff's complaint for failure to state a claim upon which relief can be granted.

## II. THE DISTRICT COURT CORRECTLY FOUND NO INFRINGEMENT BY DEFENDANT, ROOSEVELT RACEWAY

By erroneously naming Defendant, Roosevelt Raceway, in the complaint that contained allegations that might have related to others of the defendants in the present action, but not to Defendant, Roosevelt Raceway, it is apparent that the Plaintiff has attempted to make it appear that he visited with Defendant, Roosevelt Raceway, and that such Defendant, years later, used Plaintiff's information. Nothing could constitute more of a misrepresentation to the Court than such erroneous impressions and allegations.

Although Plaintiff alleges certain acts as to defendants other than Roosevelt Raceway in the present complaint, Plaintiff also attempts to make it appear that Roosevelt Raceway is guilty of the same allegations. The affidavit of Defendant's President, George Morton Levy, Jr. (App. 29-34) is pertinent. In paragraph 2 of his affidavit, Mr. Levy describes the three types of wagers offered by Roosevelt Raceway. In paragraph 6 of his affidavit, Mr. Levy states that the complaint of Plaintiff does not make any reference to and is completely devoid of any claim of infringement by Roosevelt Raceway's offer of its "Exacta"

form of wagering. Since the Triple and Big Triple are mere obvious extensions of the "Exacta", these forms of wagerings also must be assumed not to be infringements of Plaintiff's copyrights. In the present case Defendant, Roosevelt Raceway, adopted old and well known betting forms and did not draw upon anything of Plaintiff's.

Significantly, there is no allegation by Plaintiff that Defendant, Roosevelt Raceway, uses or in any manner infringes upon the titles of Plaintiff's work.

It is impossible for Plaintiff to allege that Defendant, Roosevelt Raceway, has employed any method of expression set forth in Plaintiff's copyrighted works. In this regard, Judge Mishler found, "The limited copyright of the expression of the methods of betting was not infringed." (App. 139).

This Court must arrive at the same conclusion by comparing Defendant, Roosevelt Raceway's description of its "Wagering Information" with that of Plaintiff's copyrighted works. A copy of Defendant's "Wagering Information" was attached as Exhibit 1 to the affidavit of Defendant's President, George Morton Levy, Jr. (App. 33). An additional copy of the same Exhibit is attached hereto. A copy of Plaintiff's copyrighted works was attached to Plaintiff's complaint (App. 12 and 15).

If Plaintiff, Appellant visited with representatives of many tracks as he asserts at the top of page 5 of his Brief, he should have named them. The fact is that he never visited with Defendant, Roosevelt Raceway. Hence, it is significant that Defendant, Roosevelt Raceway, disclaims knowledge, participation, publication, authorship or distribution of "Exhibit B" of the complaint (App. 16) and the attention of this Court is directed to paragraph 10 of the affidavit of Mr. Levy (App. 31) which refutes the misleading allegations of the Plaintiff, Appellant.

The attachment (page 10) to Plaintiff, Appellant's Brief is again misleading because in no way does it relate to Defendant, Roosevelt Raceway, and does not even suggest the existence of a material triable issue of fact.

## CONCLUSION

The United States District Court for the Eastern District of New York in its Order of December 3, 1975, properly dismissed Plaintiff's copyright infringement action as against the present Defendant, Roosevelt Raceway, pursuant to defendants' motions to dismiss. The Court of Appeals should affirm that Order.

The Defendant, Appellee desires to be heard orally.

Respectfully submitted,

Jerome Bauer, Esq.
BAUER, AMER & KING, P.C.
114 Old Country Road
Mineola, New York 11501
(516) 746-1291
Attorneys for Defendant, Appellee
Roosevelt Raceway, Inc.

Dated: March 24, 1976

# WAGERING INFORMATION

There are three types of wagers to be offered at Roosevelt Raceway. In addition to regular win, place, and show wagering, Roosevelt Raceway also offers wagering on exactas and triples as described below:

**THE EXACTA:** If the two horses you have selected finish first and second in the exact order, you will collect the winnings as posted.

**THE TRIPLE** If the three horses you have selected are first, second and third in the exact order of finish, you will collect the winnings as posted.

## Denominations of wagers:

Exactas will be sold in denominations of $2, $10, and $20 in the second and third races and $3, $10 and $20 in the sixth and seventh races. Triples will be sold in $3 denominations for single wagers and $18 for all box wagers.

Straight bets will be sold in denominations of $2, $10, $50, and $100, as well as $10 ($5 win - $5 place) combination tickets.

Signs in different colors (red, white, blue, yellow and green) are located over all betting windows to designate the denomination of wagers sold at those windows.

Rules on all forms of pari-mutuel wagering are posted prominently throughout the track as prescribed by the New York State Racing and Wagering Board.

**NOTE—In the event of a scratch in the Triple, no exchanges will be made. No refunds will be made on the night of the race but will be made any time thereafter up to March 31, 1976 upon presentation at windows designated for such refunds.**

**Roosevelt Raceway retains the right to make pay-offs either in cash or by check to holders of winning Triple tickets. Pay-offs of $5,000 or over will be made by check only. On pay-offs of over $900, two valid identifications are required, one of which must be a social security card. The identification is for the use of the Internal Revenue Service and any misrepresentation or false statement made herein is a violation of Title 18 and Title 26 U.S. code which carries a maximum penalty of $10,000 fine or five years in prison or both.**

# Announcing Roosevelt Raceway's NEW

# VERY IMPORTANT PATRON PROGRAM

## FOR THE CLOUD CASINO OR THE PROMENADE CAFE

**including admissions, full-course dinner, tips & taxes**

**GIFT GIVING . . . CLUB OUTINGS . . . FUND RAISING . . . EMPLOYEE GROUPS . . . SALES INCENTIVE . . . FAMILY PARTIES . . . BUSINESS GIFTS . . . HOLIDAYS . . . AWARDS . . . OR, JUST A NIGHT OUT FOR A V. I. P.**

**V. I. P. tickets are good any Monday thru Thursday during the 1975 Racing Year with advance reservation (subject to space availability) NO REFUNDS . . . EXCHANGES . . . OR SUBSTITUTIONS.**

**GOLD V.I.P. TICKETS INCLUDE PRIME RIBS OF BEEF DINNER**

**SILVER V.I.P. TICKETS INCLUDE CHICKEN, POT ROAST, OR FISH DINNER**

---

**Mail tickets to:**

**NAME** .....

**ADDRESS** .....

..... **Zip** .....

**TELEPHONE** .....

**Checks payable: ROOSEVELT RACEWAY, INC.**
**c/o Party Department**
**Westbury, N. Y. 11590**

**ORDER FORM**

| | | |
|---|---|---|
| **CLOUD CASINO-GOLD** | .... x $12.00 # | $..... |
| **CLOUD CASINO-SILVER** | .... x $10.00 # | $..... |
| **PROMENADE-GOLD** | .... x $10.00 # | $..... |
| **PROMENADE-SILVER** | .... x $ 8.00 # | $..... |
| **Gift Cards** | .... x $ .25 = | $..... |

**Check enclosed for total of** ..... $.....

EXHIBIT 1

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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No. 75-1434

LUCIO P. SALVUCCI et al.,
Plaintiffs, Appellants,

v.

NEW HAMPSHIRE JOCKEY CLUB, INC., et al.,
Defendants, Appellees.

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Before Coffin, Chief Judge,
Aldrich and McEntee, Circuit Judges.

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MEMORANDUM AND ORDER

Entered March 1, 1976

Per Curiam. On this appeal plaintiffs appellants, who have written and copyrighted certain material describing complicated betting systems for use when parties wish to bet on combinations as distinguished from a single horse or dog, brought suit against various racing associations, alleging that, after notice, they adopted and followed plaintiffs' systems, in violation of the copyright laws. 17 U.S.C. § 101. From a dismissal of the complaint, plaintiffs appeal.

As the district court correctly divined in its memorandum opinion accompanying its dismissal, plaintiffs find themselves unable to accept the fundamental difference between copyright and patent protection, although their case is a classic example or illustration of it. A system of betting is an idea, or system. Affiliated Enterprises v. Gruber, 1 Cir., 1936, 86 F.2d 958. One acquires no protection in such by copyrighting a book about it. Baker v. Selden, 1880, 101 U.S. 99.

We have examined the record and plaintiffs' brief. The issue and the answer are so clear that no purpose would be served in hearing oral argument. Judgment is affirmed under Local Rule 12.

By the Court:

/s/ DANA H. GALLUP

Clerk.

[cc: Messrs. Salvucci, Wells, Dunn and Ahlgren.]

EXHIBIT 2

CERTIFICATE OF SERVICE

This is to certify that two copies of the Brief for Appellee, Roosevelt Raceway, Inc., were mailed via First Class Mail, postage prepaid, to the following attorneys on the 30th day of March, 1976:

Mr. Lucio P. Salvucci
746 Commercial Street
Weymouth, Massachusetts 02189

Ira A. Finkelstein, Esq.
Cahill, Gordon & Reindel, Esqs.
80 Pine Street
New York, N. Y. 10005

W. Bernard Richland, Corporation Counsel
Attn: Carol Noxmer, Asst. Corp. Counsel
Municipal Building
New York, N. Y. 10007

Jerome Bauer

JEROME BAUER